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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. JOSEPH JOHN CUBBAGE, Defendant and Appellant.	H041393 (Monterey County Super. Ct. No. SS101828)

In a negotiated disposition, defendant Joseph John Cubbage pleaded no contest to one count of non-caretaker theft from his elder and dependent parents Johnnie and Patsy Cubbage. (Pen. Code, former § 368, subd. (d).)[1] The trial court placed him on felony probation for five years on condition, among others, that he pay $581,888.48 in victim restitution. Defendant appeals and the People cross-appeal from the restitution order. Both challenge the amount of restitution awarded. We reject defendant's contentions but conclude that the Attorney General's contention has merit. We reverse the order and remand the matter for further consideration by the trial court.

[1] Further statutory references are to the Penal Code unless otherwise specified.

I. Background[2]

Johnnie retired from his job as an automotive electrician at a manufacturing facility in February 2009.[3] His wife Patsy was also no longer working. She suffered from Fuch's disease and was nearly blind. The Cubbages owned a home on Cheshire Way in Salinas. They have two adult children, defendant and his younger sister Mayaria.

On May 6, 2009, Johnnie seemed confused and did not believe he had been retired for several months. He was admitted to Salinas Valley Memorial Hospital and diagnosed with "'acute confusion.'" A psychiatrist who evaluated him after his May 11, 2009 discharge from the hospital diagnosed him with dementia not otherwise specified. The psychiatrist opined that Johnnie was incapable of giving informed consent, unable to ask for help at his stage of cognitive degradation, and not competent to live on his own. Johnnie was later diagnosed with voltage-gated potassium channel paraneo-plastic limbic encephalitis, an exceedingly rare condition.

On May 26, 2009, defendant arrived at his parents' Cheshire Way home and said he was taking his father to the gym. Defendant later informed Patsy that he would keep Johnnie for the evening. He did not bring Johnnie home. In August 2009, Patsy received a letter from a law firm called Lawyers on Duty. The letter was captioned "Marriage of Cubbage Legal Separation." Patsy did not want a divorce but "[d]id what the letter basically said" and "went and retained an attorney" to protect the marital assets.

In October 2009, Mayaria called the Salinas Police Department and reported that her parents were victims of elder/dependent financial abuse. She told Sergeant James

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[2] Since this case was resolved by plea, the facts are taken from the transcript of the restitution hearing and from the probation report and preliminary examination transcripts, both of which the trial court also considered.

[3] To avoid confusion occasioned by shared surnames, we refer to Johnnie and Patsy Cubbage and to their daughter Mayaria and her husband Michael Shapiro by their first names.

Arensdorf that she had not seen or heard from her father since May 2009. Arensdorf telephoned defendant, who said it was "a family situation" that did not require police involvement. Defendant told Arensdorf that he had power of attorney over his father's affairs, that they had just gotten back from a month-long trip to Europe, and that he was not allowing family members to have contact with his father "because it would upset him."

Arensdorf's investigation into Johnnie's welfare revealed that defendant had taken his father to cash out his Ameritrade and Merrill Lynch retirement accounts, which totaled $416,273.21. Arensdorf contacted Steve Mudd, a social worker at Adult Protective Services. Mudd conducted a home visit to check on Johnnie's welfare. He reported that Johnnie appeared to be in good health but had no knowledge of his retirement accounts, home ownership, or other finances and "really no recollection or insight [into] his current financial situation." Johnnie told Mudd he would be happy to see his wife and family. Defendant told Mudd he had obtained power of attorney, was managing his father's finances, and had used his father's retirement funds to purchase a house in Seaside. Title to the Seaside property was held by the newly-formed Joey Cubbage, LLC. Defendant owned 90 percent of the limited liability company and his father owned 10 percent. The LLC's "operating and ownership agreement" guaranteed defendant "'rent free' full time residency at [the Trinity Avenue address] until sale of property or the death of Johnnie D. Cubbage."

Arensdorf checked with the Monterey County Recorder's Office and confirmed that a house on Trinity Avenue in Seaside had been purchased in 2009 in the name of Joey Cubbage, LLC. Arensdorf learned that another house on Vallejo Street in Seaside had been purchased the same day in the name of defendant's wife Janet.

In early 2010, defendant contacted Johnnie's sister Jacqueline Toppin in Alaska to say he needed a break and wanted to send Johnnie to stay with her for a while. He instructed her not to tell family members that Johnnie was there and not to allow Johnnie

to talk to family members, "especially . . . Mayaria." Johnnie arrived in Anchorage on February 20, 2010 "with no credit cards and $440 in cash . . . ." He stayed with Toppin for approximately six weeks. Toppin said Johnnie expressed concern about his finances on an almost daily basis. She obtained his credit report and discovered that the credit cards he paid off before he retired had thousands of dollars charged to them. Toppin contacted Mayaria and related her concerns. Mayaria flew to Alaska to visit Johnnie in March 2010. Johnnie flew back to California with her and moved in with her and her husband.

Meanwhile, Arensdorf had obtained copies of financial records relating to Johnnie's accounts. These included checks drawn on First National Bank (including a $20,000.00 check for "cash" on June 25, 2010; a $5,000 check to defendant on July 15, 2009; and a $2,000 check to Lawyers on Duty on July 16, 2009); a $3,000 check for "cash" drawn on First National Bank on August 12, 2009; seven U.S. Bank cashier's checks to Johnnie on August 17, 2009, each for $20,000; a $10,781.47 cashier's check to Johnnie on August 19, 2009; a U.S. Bank cashier's check to Patsy for $115,000.39 on August 29, 2009; and four U.S. Bank cashier's checks to defendant on September 1, 2009, each for $5,000.00. The records also included a June 2, 2009 document transferring ownership of Johnnie and Patsy's Cheshire Way home (which they owned in joint tenancy) to Johnnie and defendant; and an IRS form 1099 for 2009 showing a gross distribution of $254,412.41 from Merrill Lynch with no taxes withheld.

Mayaria instituted conservatorship proceedings in April 2010. Defendant filed a competing petition. Jacquie Depetris was appointed temporary conservator of Johnnie's estate and met with defendant in May 2010. He told her that Johnnie gave him the seven $20,000 cashier's checks as a birthday present. He also told her that the $115,000.39 check to Patsy was what he determined to be her fair share of his father's retirement accounts.

Mayaria was appointed conservator in August 2010. In 2012, Johnnie's condition deteriorated and he was moved to a secure facility.

Defendant was arrested on August 18, 2010. An amended information charged him with two counts of non-caretaker elder theft (former § 368, subd. (d)), financial elder abuse (former § 368, subd. (e)), two counts of grand theft (former § 487, subd. (a)), and money laundering (former § 186.10, subd. (a)). It was also specially alleged that the first five counts involved property thefts in excess of $200,000 (former § 12022.6, subd. (a)(2)) and that the sixth count involved a taking of more than $100,000 (former § 186.11, subd. (a)(3)). In March 2012, defendant pleaded no contest as previously described. The court placed him on felony probation for five years with various terms and conditions, with the amount of victim restitution to be determined at a later date. The remaining charges and special allegations were dismissed.

The parties engaged in extensive pre-hearing briefing with respect to the categories and approximate amounts of restitution sought. The People explained that they were seeking restitution for (1) professional fees paid to protect the victims; (2) cash or similar direct losses; (3) losses flowing from defendant's criminal conduct (including the tax consequences of cashing out the retirement accounts, the loss of investment income, the loss of the Cheshire Way home, the cost to repair the Trinity Way house, and the income lost while those repairs were made); (4) miscellaneous fees including conservatorship fees, bonding expenses, and eviction expenses; (5) mental health counseling fees; (6) wages lost by Mayaria; and (7) attorney's fees that defendant paid to Lawyers on Duty "with Johnnie and Patsy Cubbage's money."

Defendant responded that Johnnie's health would have required the appointment of a conservator notwithstanding defendant's involvement in "the questionable financial transactions." He asserted that "much if not all" of the amounts taken were "still within the estate" because he gave Patsy $115,000.39, spent $195,000 to buy the Trinity Way

house, and made "at least" $32,000 in "improvements" to it. He also argued that Patsy's sale of the Cheshire Way home resulted in a profit of $92,500.

The People replied that there was no evidence of $32,000 in improvements made to the Trinity Way house, "and if those improvements were illegal or poorly done and had to be redone then the money is simply lost." They noted that defendant had "never provided a full accounting of all of his accounts or where the money he took went." They claimed that he "took a whole filing cabinet which contained the financial records of Johnnie and Patsy Cubbage thus making it near impossible to trace the money in this case." The People also noted that "[d]uring the financial accounting done at the People's expense and request, Cindy Healy was unable to document where certain money was obtained or moved." The People noted further that defendant "could explain" but refused to do so in the civil suit that the conservatorship brought against him and the financial institutions that handled Johnnie's accounts.

The court conducted a restitution hearing on May 16 and 19, 2014. Mayaria testified that the "roughly $400,000" taken from the Ameritrade and Merrill Lynch accounts was the sum of her father's retirement money. She explained that her parents bought the Cheshire Way home for $212,500 in 1997 and intended to remain there for the rest of their lives. They were current on the mortgage and tax payments before defendant took Johnnie from the home in May 2009. Defendant assured Patsy that he was paying the mortgage, and she did not learn that he had stopped doing so until she "eventually . . . got a statement in the mail . . . ." Patsy was forced to sell the Cheshire Way home "because the funds had been taken and the payments had stopped being made . . . . The taxes weren't paid. And she was going to lose the house." The house sold for $305,000 in 2011, and Patsy moved into a rented duplex. Johnnie was living with Mayaria and her husband at the time of the hearing.

Mayaria testified that of the "roughly $400,000" in her father's retirement accounts, a $115,000 check "came back" to her mother in August 2009. Patsy used that

money to bring the Cheshire Way mortgage current, to pay "a lot of legal fees," and to pay moving and living expenses. Mayaria had not seen any of the remaining $285,000 taken from the retirement accounts. However, defendant was ordered in the conservatorship proceedings to quitclaim the Trinity Avenue property back to the estate. He did so in September 2010. Mayaria told the court that defendant bought the Trinity Way house for $195,000 with funds from Johnnie's retirement accounts.

Mayaria detailed the expenditures that she and/or the conservatorship incurred as a direct result of defendant's criminal conduct. She paid a private investigator to find her father after defendant took him from the family home in 2009. She retained attorney Lori Espinoza to represent her in the contested conservatorship proceedings. She retained tax lawyers to deal with and attempt to negotiate reductions in the significant tax liabilities created by the sudden liquidation of her father's retirement accounts. The state tax bill exceeded $53,000 but the Franchise Tax Board agreed to accept $17,611.72 and that amount had been paid. The IRS bill had been reduced to $69,185.15 by the time of the restitution hearing but the amount was not yet settled and Mayaria was still working on a further reduction. She noted that she was required as a conservator to post a bond annually.

Mayaria testified that the conservatorship had to file an unlawful detainer action to evict defendant from the Trinity Avenue house. The condition of the property was "horrible." "There wasn't an operating kitchen in it" because defendant "had ripped out the kitchen." "The plumbing . . . wasn't in working order." Significant repairs had to be made to bring the property up to code. Electrical and other repairs that had not been properly done or permitted had to be redone. There was a city lien on the property as a result of defendant's failure to cooperate on a fence. As conservator, Mayaria had the authority to make repairs, and the expenses she incurred were approved by the court overseeing the conservatorship. The house could not be rented or sold during the unlawful detainer proceeding or while the necessary work was being done, and this

caused a loss of rental income. At some point, the house was rented for $1,250 a month. It was eventually sold because Johnnie had no liquid assets to supplement his $1,800 monthly Social Security income. There was no testimony about the sales price, but defendant's trial counsel stated during colloquy, "I think it's 215,000 was the sale price. And then with everything else, it was 286. . . . Either 250 or 286. That's my memory."

Mayaria's husband Michael testified that he was employed as a deputy sheriff with the Monterey County Sheriff's Department and experienced in investigating financial crimes. On his own time on May 15, 2014, he ran searches on the Zillow, Trulia, and RealtyTrac Web sites to estimate the value of the Cubbages' former Cheshire Way home. He averaged the figures he obtained from those sites and came up with a then-current value of $412,074. He did not research the current value of the Trinity Avenue house.

Michael testified that Mayaria obtained copies of Johnnie's credit card statements and that they also ran credit reports, as Johnnie's sister had earlier done. The Cubbages' credit card debt had been paid "down to zero" at the time Johnnie retired but the statements reflected more than $10,000 in credit card debt. The credit reports showed "an excess of $30,000 in credit card debt" during the period following Johnnie's removal from the family home. Michael explained that the credit report was "the most complete and comprehensive information" that he had.

Michael testified that Patsy told him defendant gave her a credit card "and told her it was hers." Michael later learned that defendant "place[d] himself as an authorized account user on this account." Patsy's credit report reflected charges on that account for $1,300 and for $23,308 that she did not make. Even though her credit report showed that the latter amount relating to an auto loan was paid in settlement and written off, Patsy was still receiving phone calls about the debt, which had apparently been sold to an independent debt collector.

Espinoza testified about the legal fees and expenses the conservatorship incurred in attempting to marshall assets for the estate and to minimize the harm defendant's

criminal conduct caused. She represented Mayaria in the conservatorship proceedings and in the unlawful detainer action and she also obtained domestic violence and elder abuse restraining orders against defendant. Espinoza explained the fees paid to temporary conservator Depetris, to the attorney who was appointed to represent Depetris during the conservatorship proceedings, and to the attorney that the court appointed to represent Johnnie.

Defendant testified that his father "was doing pretty good on his own," was "very astute in the area of finance," and was able "to talk about what his retirement accounts were, things like that" in May 2009 when defendant began caring for him. According to defendant, it was Johnnie's idea to cash out his retirement accounts. Johnnie wanted to travel to Europe because it was on his "bucket list." Defendant did not know how much the trip cost but "it was expensive." Johnnie paid for the trip. The four cashier's checks totaling $100,000 from Johnnie's Ameritrade account were "gifted" to defendant. "That money went back into the purchase of the [Trinity Way] home." The four cashier's checks totaling $20,000 were similarly "my money." That money was "most likely" put back into the Trinity Way house. It was Johnnie's idea to form the LLC and to give defendant a 90 percent ownership interest in the Trinity Way house to "protect" the money in the event of a divorce.

Defendant admitted using his father's credit cards. When he was asked if he also used his mother's credit cards, he responded, "Always have." Defendant asserted that none of the money from his father's retirement accounts went to "anything frivolous or outlandish or anything that would not provide for the health, welfare or long-term stability of my father." "Every dime that my father had, whether it be between Merrill Lynch and Ameritrade, those monies went to these places to my knowledge, what I know: They went to his lawyers. They went to my mother. They went to fixing up the [Cheshire Way] house in Salinas to prepare it for sale, which was part of their separation agreement. They went to the mortgage payment in Salinas. They went to the

medications and insurance. It went to hotels when we were traveling. It went to food and gasoline."

In a written order, the trial court awarded $581,888.48 in victim restitution. At the hearing to announce the ruling, the court explained that "I am going to do something that I don't normally do, and I am going to read my decision in this matter." The court's written order stated that "[t]here are two overall categories of restitution presented in this matter: (1) [e]xpenses resulting from the defendant's conduct, and (2) profits lost due to defendant's conduct. Both of these categories will be discussed in detail below."

"(1) Expenses resulting from the defendant's conduct. [¶] The affirmative evidence presented in this matter includes believable testimony of Mayaria Shapiro, Lori Espino[z]a and Michael Shapiro. The court finds that Johnnie Cubbage was for many years an astute manager of the finances of his family, including his wife, Patsy Cubbage. During May 2009 Johnnie Cubbage became physically and mentally incapacitated, resulting in the defendant taking over the care of Johnnie Cubbage and the control of Johnnie and Patsy Cubbage's assets. In August 2009 when other family members learned that Lawyers on Duty had been retained, ostensibly by Johnnie Cubbage, to initiate a legal separation between Johnnie Cubbage and Patsy Cubbage (see Exhibit 1, pg. 74)[4] efforts were initiated to assist in the protection of the assets of Johnnie and Patsy. These efforts began by contacting the law firm of Lavorato & Scott (see Exhibit 1, pg. 1-3) and continued with conservatorship proceedings related to Johnnie Cubbage (see Exhibit 1, pg. 9-13; 163-164). The court specifically finds that without the actions taken by defendant, Joseph Cubbage, conservatorship proceedings would not have been necessary to protect the assets of Johnnie and Patsy Cubbage, and thus attributes the costs

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[4] People's exhibit 1 was a "packet of documents" containing at least 167 pages, which the parties and the court referenced at the restitution hearing. It is not included in the record on appeal.

associated with the conservatorship and related proceedings to defendant. Based on the defendant's actions related to the assets of Johnnie and Patsy Cubbage during 2009, and the resulting conviction, the instant restitution order for expenses is made in the total amount of $220,676.26 (hereinafter the 'Expenses')." An itemized list of the expenditures (including, among other expenses, $96,528.55 in legal fees and expenses, $4,689 for the temporary conservator, $1,650.63 in bond fees, $240 for a CPA, $1,325 for the private investigator, $86,796.87 for tax consequences, $17,645.50 in credit card charges and fees, and $1,500 for a desk and computer taken by defendant) followed.

The order continued: "(2) Profits lost due to defendant's conduct. [¶] Affirmative evidence was presented of three significant assets held by Johnnie and Patsy Cubbage prior to the time that defendant began control and direction of these assets. The assets have been referred to as: (1) 401k NUMMI; (2) TD Ameritrade Account; and (3) Cheshire Home. [¶] Prior to liquidation, the value of the 401k NUMMI and TD Ameritrade Account (hereinafter the 'Cash Accounts') totaled $416,273.21. Testimony regarding conversion of a portion of the Cash Accounts to other types of property, including the property located on Trinity Avenue, Seaside was presented. Insufficient evidence was received, however, to allow the court to follow the trail of these assets. Nor was the court presented with information regarding the asset inventory remaining intact from the original Cash Accounts at the time the conservator assumed control of the assets. It is possible to extract from the testimony taken at the restitution hearing that liquid assets remaining at the time the conservatorship was established were insufficient to cover the expenses related to the conservatorship proceedings."

"The court is left to determine an alternate method to compensate the victims for the loss of income from the Cash Accounts. Penal Code section 1202.4(f)(3)(G) provides for: 'Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss as determined by the court.' Interest on the amounts contained in the Cash Accounts at 10%, compounded annually for the 5 year period from June 2009 to

June 2014 results in a restitution amount for [lost] profits on the Cash Accounts in the amount of $254,138.22."

The court then addressed the loss of the Cheshire Way home. "The Cheshire Home was sold for a price of $305,000.00. The court finds that the sale of the Cheshire Home was the direct result of the defendant's illicit conduct and actions. Testimony presented at the restitution hearing indicated a current average value of the Cheshire Home of $412,074.00 resulting in a loss in the amount of $107,074.00 due to the sale of the Cheshire Home. [¶] Thus, total amount attributable to the lost profits on the assets is $361,212.22." The court added this amount to the $220,676.26 in expenses and awarded a total of $581,888.48.

Before the hearing concluded, the district attorney called the court's attention to the fact that the award included lost investment income as well as expenses attributable to defendant's criminal conduct but no award for "the actual theft of $416,000." Counsel stated that he was "not sure if the Court is saying this was a failure on the part of the People to prove." The court responded, "That $416,000 I thought was explained clearly. There were some assets that were remaining. I don't know what those assets were. [¶] If you have some question about that, you can appeal the Court's order. Those assets were converted into expenses to cover that conservatorship and also an asset that was this Trinity home that had some cash value. And the Court awarded the expenses as well as lost profits. [¶] As I say, you are welcome to appeal the Court's order. I don't think there is anything else that you could have provided. I don't think any of the other people who testified testified they could follow the trail either, and I don't think following it -- if you would follow the trail of the assets, then you wouldn't get the income from those assets that the Court awarded . . . ." When the district attorney stated that "with all due respect, I don't believe the Court is correct" and referred the court to the People's pre-hearing briefing, the court responded, "As I said, you are certainly more than welcome to

appeal the Court's order in this matter. I think the Court has issued an order that accommodates a significant amount of restitution in this matter . . . ."

Defendant timely appealed from the restitution order and the People timely filed a cross-appeal.

II. Discussion

A. Standard of Review

In 1982, California voters passed Proposition 8, also known as the Victims' Bill of Rights. (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).) "The initiative added article I, section 28, subdivision (b) to the California Constitution: 'It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.'" (*Giordano*, at p. 652.)[5]

Former section 1202.4 implements Proposition 8's constitutional mandate. It provides that "[t]o the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to . . . [¶] (A) Full or partial payment for the value of stolen or damaged property. . . . [¶] . . . [¶] (E) Wages or profits lost by the victim . . . . [¶] . . . [¶] (G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss . . . . [¶] (H)

[5] On November 4, 2008, the electorate passed Proposition 9, which rewrote article I, section 28 in ways not relevant to our analysis. (See Historical Notes, West's Ann. Cal. Const., (2012 ed.) foll. art. I, § 28, pp. 8-10.)

Actual and reasonable attorney's fees and other costs of collection . . . . ." (Former § 1202.4, subd. (f)(3)(A), (E), (G), (H).)[6] "[T]he right to restitution, and the categories of covered 'victims' are to be broadly and liberally construed." (*People v. Runyan* (2012) 54 Cal.4th 849, 865.) "'[S]entencing judges are given virtually unlimited discretion as to the kind of information that they can consider and the source from whence it comes.' [Citation.] Probation reports are among the permissible sentencing data the court may consider." (*People v. Baumann* (1985) 176 Cal.App.3d 67, 81.)

"[W]e review the trial court's restitution order for abuse of discretion. [Citations.] The abuse of discretion standard is 'deferential' but it 'is not empty.' [Citation.] '[I]t asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citation].' [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the victim's . . . loss." (*Giordano, supra*, 42 Cal.4th at pp. 663-664.) "'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.'" (*People v. Mearns* (2002) 97 Cal.App.4th 493, 499 (*Mearns*).)

"In reviewing the sufficiency of the evidence [supporting a restitution award], the '"power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings.' [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.] 'If the

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[6] We apply the version of the statute in effect when defendant committed his crime. (*People v. Martinez* (2005) 36 Cal.4th 384, 389.) The relevant time period in this case is May 2009 to April 2010. Two versions of former section 1202.4 were in effect during that period. (Stats. 2008, ch. 468, § 1; Stats. 2009, ch. 454, § 1.) The 2008 and 2009 versions are the same for all purposes relevant to our analysis.

circumstances reasonably justify the [trial court's] findings,' the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citations.]" (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469.)

B. Lost Investment Income

Defendant contends that the trial court abused its discretion in computing lost interest on the stolen retirement accounts without first deducting the $115,000.39 that he gave Patsy in August 2009. He asserts that there was "no substantial evidence that the money paid to Patsy was money for which five years of interest could be charged." We disagree.

Defendant's argument ignores Mayaria's testimony that her mother used the $115,000.39 to bring the Cheshire Way mortgage current, to pay "a lot of legal fees," and to cover living and moving expenses. The evidence established that Patsy had to bring the Cheshire Way mortgage current because defendant stopped making the payments and only belatedly informed her of that fact. Patsy was forced to sell the Cheshire Way home "because the funds had been taken and the payments had stopped being made . . . . The taxes weren't paid." Because she lost the house, she had to move into a rented duplex. Thus, substantial evidence supported the trial court's implicit determination that Patsy used the $115,000.39 for expenses she incurred as a result of defendant's criminal conduct. But for defendant's criminal conduct, the $115,000.39 would have remained in the Cubbages' retirement accounts. The Cubbages were entitled to recover the income it would have earned. (Former § 1202.4, subd. (f)(3)(E), (I).) Thus, the trial court did not abuse its discretion in computing lost interest on the stolen retirement funds without first deducting the $115,000.39 that Patsy received.

C. Loss from Forced Sale of Cheshire Way Home

Defendant contends that the trial court abused its discretion in computing the loss from the sale of his parents' Cheshire Way home as the difference between its value at the time of the hearing and the price it sold for in 2011. He argues that the court "improperly failed to consider the time value of the $305,000 [difference in value] from the date of sale in 2011 forward to the current valuation of the real property itself."

Defendant forfeited this argument by failing to raise it below. (*People v. Prosser* (2007) 157 Cal.App.4th 682, 689 (*Prosser*); *People v. Geddes* (1991) 1 Cal.App.4th 448, 457 ["If Geddes was concerned about the possibility of double reimbursement for Casenave, it was incumbent on him to raise the issue in the trial court. Having failed to do so, he cannot raise the issue for the first time on appeal."].)

We reject defendant's assertion in his reply brief that "the ruling on this point was not one that had been urged or requested by the People, the defense could not have anticipated it, and the court was not open to entertaining any objections or further arguments after its written decision had been announced." The People presented evidence that the Cubbages fully intended to spend the rest of their lives in their Cheshire Way home. They presented evidence that Patsy did not want to sell the home but was forced to do so as a result of defendant's criminal conduct, which left her without access to the retirement accounts and thus precluded her from remedying his undisclosed failure to make the mortgage and tax payments. The amount the trial court awarded in essence gave the Cubbages the replacement cost of their Cheshire Way home. Former section 1202.4 expressly authorizes the court to award "the replacement cost of like property . . . ." (Former § 1202.4, subd. (f)(3)(A).) Thus, there was nothing novel or unusual about the award, and it was not one that the defense could not have anticipated.

Defendant's reliance on *People v. Pangan* (2013) 213 Cal.App.4th 574 (*Pangan*) is misplaced. *Pangan* was a drunk-driving-with-injuries case which required the trial court to calculate pension benefits lost because the victim's injuries forced his immediate

retirement. (*Id.* at p. 577.) The *Pangan* court held that "[i]t is an abuse of discretion not to account for the time value of money in determining a victim's economic loss based on a diminished or lost stream of *future* payments." (*Id.* at pp. 576, 586.) That sort of loss is not at issue here. *Pangan* is inapposite.

D. Conservatorship Costs

Defendant contends that the trial court abused its discretion in attributing all of the conservatorship expenses to him. We disagree.

"At the core of the victim restitution statutory scheme is the mandate that a victim who suffers economic loss is entitled to restitution . . . 'based on the amount of loss claimed by the victim.' Thus, a victim seeking restitution . . . initiates the process by identifying the type of loss (§ 1202.4, subd. (f)(3)) [that] he or she has suffered and its monetary value." (*People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886 (*Fulton*).) "At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss." (*People v. Millard* (*2009*) 175 Cal.App.4th 7, 26.) Victims' rough estimates of their losses can be sufficient. (E.g., *People v. Phu* (2009) 179 Cal.App.4th 280, 283-284; *People v. Goulart* (1990) 224 Cal.App.3d 71, 83-84.) "Once the record contains evidence showing the victim suffered economic losses . . . this showing establishes the amount of restitution the victim is entitled to receive, unless challenged by the defendant." (*Fulton*, at p. 886.) "[T]he burden shifts to the defendant to disprove the amount of losses claimed by the victim. [Citation.] The defendant has the burden of rebutting the victim's statement of losses." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543 (*Gemelli*).)

Here, the People provided a detailed accounting of conservatorship-related expenditures. Mayaria and Espinoza both testified about the necessity for and the amount of those costs. The People also submitted copies of invoices substantiating the amounts

spent. The level of detail they provided is reflected in the trial court's order, which itemized expenditures to the penny. The People's showing was more than sufficient to establish a prima facie case for recovery of all conservatorship-related costs incurred as of the date of the restitution hearing. (See *Prosser*, *supra*, 157 Cal.App.4th at pp. 690-691 ["[I]t is well settled that 'statements by the victims of the crimes about the value of the property stolen constitute "prima facie evidence of value for purposes of restitution." [Citations.]' "].)

Defendant did not challenge any of those expenditures. He offered no evidence that any particular expense was unwarranted or excessive or duplicative. On the contrary, he asserted in his post-hearing briefing that "[t]he time and amounts of expenditures are not challenged."

Defendant argued below that there was "no evidence that [he] was responsible for his father's mental decline" and that Johnnie "would have required a conservatorship, even had [defendant] not been a party to the questionable financial transactions." He offered no evidence, however, that his father's mental decline (as opposed to defendant's own criminal conduct) necessitated the conservatorship. The trial court rejected the conclusory argument and "specifically" found that "without the actions taken by defendant . . . conservatorship proceedings would not have been necessary to protect the assets of Johnnie and Patsy Cubbage."

Substantial evidence supported the trial court's factual finding. There was ample evidence of defendant's criminal meddling in his parents' financial affairs and of the damage it caused. Mayaria testified that she initiated conservatorship proceedings "because my father needed the conservatorship. My brother had financially abused him and he needed to be conserved so that he was no longer a victim." Espinoza testified that not all families need a conservatorship at the end of life or when they encounter health problems. A conservatorship is necessary, however, "if there's suspected financial elder abuse." Espinoza opined that the conservatorship was "absolutely" necessary to protect

Johnnie from defendant's financial abuse and undue influence. On this record, the trial court properly found that defendant's criminal acts necessitated the conservatorship. The court properly included costs associated with the conservatorship in the award.

Citing a snippet of Espinoza's testimony, defendant urges that there was "a diminution of proximate causation over time" that requires a remand to the trial court for further consideration. He forfeited this argument by failing to raise it below. (*Prosser, supra,* 157 Cal.App.4th at p. 689.) It lacks merit in any event. Defendant's trial counsel asked Espinoza during cross-examination, "So this conservatorship that is presently in effect, could you verbalize the need for that *at this point*?" (Italics added.) The question did not challenge any amounts that had been spent in connection with the conservatorship as of the date of the hearing. We interpret the question to refer to continuing and/or future costs. The court did not order defendant to pay any such costs. Thus, it is irrelevant that Espinoza was allegedly unable "to articulate any continuing concerns" that would justify future costs.

E. Failure to Award Restitution for the Stolen Funds

In her cross-appeal, the Attorney General contends that the trial court abused its discretion in failing to award any portion of the $416,273.21 stolen from the Cubbages' retirement accounts. We agree.

"'A victim's restitution right is to be broadly and liberally construed.'" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) "'[T]he trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.'" (*Mearns, supra*, 97 Cal.App.4th at p. 498.) "Full restitution is mandatory unless the court 'finds compelling and extraordinary reasons'" for not awarding it "'and states them on the record.'" (*Fulton, supra*, 109 Cal.App.4th at p. 885; former § 1202.4, subds. (f) & (g).) "To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the

restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Giordano*, *supra*, 42 Cal.4th at p. 664.)

Here, the court made a factual finding that the value of the retirement accounts before the cash-out was $416,273.21. The court properly included lost income from the accounts in the restitution award. (Former § 1202.4, subd. (f)(3)(E), (G).) The court failed, however, to award any portion of the $416,273.21 stolen from the retirement accounts. (Former § 1202.4, subd. (f)(3)(A).) The court's interest-only award cannot reasonably be said to make the victims in this case whole. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 995 (*Thygesen*).)

In *Thygesen*, the trial court required the victim to choose either the replacement cost of a cement mixer stolen from his equipment rental company or compensation for the loss of its use. (*Thygesen*, *supra*, 69 Cal.App.4th at p. 991.) The Court of Appeal reversed, finding "no logical reason why the trial court made [the victim] choose . . . . The correct award should have been predicated on the 'replacement cost of *like* property'" and the victim should "[a]dditionally . . . receive a reasonable amount for loss of use." (*Id.* at pp. 994-995.) The same result is warranted here. The restitution award should have compensated the Cubbages not only for the loss of income on their stolen funds but also for the loss of the funds themselves. (*Thygesen*, at pp. 994-995; *People v. Tucker* (1995) 37 Cal.App.4th 1, 3 [criminal defendant properly ordered to pay appreciated value of assets he embezzled from the victim's trust fund].)

The trial court apparently declined to award restitution for the stolen funds because there was "[i]nsufficient evidence . . . to allow the court to follow the trail of these assets. Nor was the court presented with information regarding the asset inventory remaining intact from the original Cash Accounts at the time the conservator assumed control of the assets." In our view, this was not a "compelling and extraordinary

reason[]" for failing to include any portion of the stolen funds in the restitution award. (Former § 1202.4, subds. (f) & (g).)

The People presented evidence that defendant removed his father from the family home in May 2009 and (by defendant's own admission) began "managing his father's finances." They presented evidence that defendant wrongfully caused the cash-out of his parents' retirement accounts with no withholding for taxes. They presented evidence that defendant improperly diverted much or all of the $416,273.21 from the accounts to his own benefit. This included more than $100,000 purportedly "gifted" to him by his father and "about $40,000" (as represented by defendant's former trial counsel) that went to an "expensive" trip to Europe. There was evidence that defendant used $195,000 from the cashed-out accounts to purchase the Trinity Way house, with title vested in a company that was 90 percent owned by him. Espinoza testified, however, that the Trinity Way house "was brought back or marshaled into the conservator estate" and that "reflected $195,000 of the money that came from the cashed-out accounts." This evidence constituted a more than sufficient prima facie claim to an additional award of $221,273.21 for the stolen funds. That figure represents the $416,273.21 taken from the retirement accounts minus the $195,000 that Espinoza testified was recovered when the Trinity Way property was brought back into the estate. (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1180 ["[A] victim is not entitled to restitution for the value of property that was returned to him or her."].)

In citing "insufficient evidence" for its failure to award restitution for the stolen funds, the trial court effectively put the burden of proving offsets on the People. This was "'a "'demonstrable error of law'"'" and an abuse of the court's discretion. (*Millard*, *supra*, 175 Cal.App.4th at p. 26.) The court should have put the burden of rebutting the People's claim for restitution on defendant. (*Gemelli*, *supra*, 161 Cal.App.4th at p. 1543.) "This approach complies with the statutory mandate that the amount of restitution is to be based on the 'loss claimed by the victim' and the designated right of the

defendant to a hearing 'to dispute the determination of the amount of restitution.'" (*Fulton, supra*, 109 Cal.App.4th at p. 886.) Here, to the extent the evidence adduced below was insufficient to prove offsets, "[i]t was up to defendant to . . . seek whatever documentation [he] thought would be necessary to challenge" the amounts claimed. (*Prosser, supra*, 157 Cal.App.4th at p. 685.) If a defendant is unable to do so "it is indeed awkward. But the situation is one of the thief's own making, and as between the victim and the thief, the equities favor the victim." (*Prosser*, at p. 691.)

This matter must be remanded for further consideration by the trial court. Remand is required because on the record before us (which as noted does not include the 167-plus-page People's exhibit 1 or a number of other exhibits) we cannot say that the $195,000 recovered when the Trinity Way property was quitclaimed back to Johnnie is the only appropriate offset to the amount the People claim for the loss of the stolen funds. We leave it to the trial court to make that determination on remand, based on the evidence the parties have already presented.

III. Disposition

The restitution order is reversed. On remand, the trial court shall increase the award of restitution by an amount the court determines will reasonably compensate the Cubbages for the $416,273.21 stolen from their retirement accounts. In making that determination, the court shall apply the proper burden of proof to the evidence already presented.

_____
Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

_____
Bamattre-Manoukian, J.

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